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CITIZENSHIP BY NATURALIZATION.

I.

NATURALIZATION being an act by which a change of political *status* is effected, under regulation of municipal or national authority, is a proceeding within the exclusive cognisance of the municipal or national tribunal, to whose administration it is committed by the supreme authority; and as the validity of the act depends upon construction of municipal or national law, all questions, whether of fact or of law, growing out of the act, are referable to the municipal or national court or tribunal. It is never a question of international concern, and is not determinable by reference to external, international or public law.

It may be, however, and not infrequently is, the subject of treaty stipulation between powers who are not satisfied with the existent state or condition of the law or practice, either in respect of the terms or the mode by which a change of nationality is effected.

The national character, which results from origin, continues till legally changed; and the *onus* of proving such change, usually rests upon the party alleging it. Naturalization, it has been said,<sup>1</sup> is the rule of modern states.

Whether wisely or not, each nation, in the absence of treaty stipulation, reserves to itself the right to dictate the terms and to prescribe the formalities upon which the certificates or letters of

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<sup>1</sup> Argument on Naturalization, by the advocate of the United States, before the American-Spanish Commission (under agreement, February 12th 1871). Washington, D. C.

naturalization will be issued, as well as the individuals to whom they may be issued; and it exercises this right without reference to the country of origin of the individual applicant, or any other country. And no nation which assumes the responsibility of naturalizing aliens makes any concession as to this, except under the solemnity and sanctity of treaty stipulation, and by the employment of express and explicit language in regard thereto.

"It has already been remarked," says an author whose utterances are everywhere received with respect and confidence (Halleck's International Law and Laws of War 693), "that every independent state has, as one of the incidents of its sovereignty, the right of municipal legislation and jurisdiction over all persons within its territory, whether its own subjects or foreigners, commorant in the land. With respect to its own subjects this right, it is claimed, includes not only the power to prohibit their egress from its territory, but to recall them from other countries; and with respect to commorant foreigners, not only to regulate their local obligations, but to confer upon them such privileges and immunities as it may deem proper. It may, therefore, change their nationality by what is called naturalization. It is believed that every state in christendom accords to foreigners, with more or less restrictions, the right of naturalization, and that each has some positive law or mode of its own for naturalizing the native born subjects of other states, without reference to the consent of the latter for the release or the transfer of the allegiance of such subjects. It seems, therefore, that so far as the practice of nations is concerned, the right of naturalization is universally claimed and exercised without any regard to the municipal laws of the states whose subjects are so naturalized." Fœlix, Droit International Prive, §§ 27-55; 1 Phillimore on Int. Law, §§ 315, *et seq.*; Cushing, Opinions U. S. Attorney-General, vol. 8, p. 125, *et seq.*; Don, Derecho Publico, tome 1, cap. 17; Riquelme, Derecho Internacional, tome 1, p. 319; Heffter, Droit International, § 59; Westlake, Private Int. Law, § 20, *et seq.*; Bello, Derecho Internacional, pt. 2, cap. 5, § 1.

"Naturalization, in most of its aspects, belongs to the department of Municipal Law, or Private International Law." \* \* \*  
"Public international law can seldom be concerned in the question of political citizenship acquired by naturalization, unless, &c." \* \*  
"Every nation claims the right to give the complete character of citizen to an alien, without consulting the wish of the state of his

birth. Most nations admit, that if a native voluntarily emigrates and makes a permanent domicile in another country, and receives from that country the full rights of citizenship, the country of his birth cannot enforce claims upon him *originating after his naturalization.*" Wheat. Intern. Law, Dana's 8th ed., p. 142 *et seq.*; note by the editor.

While laying down the same doctrine, in language at once positive and conclusive, an eminent publicist (Calvo, *Derecho Internacional*, vol. i., pp. 295, *et seq.*), says: "But if it is beyond doubt that every independent nation has a right to confer the title of citizen upon a foreigner, it is also true that she can control the loyalty of her own subjects, and she can impose conditions upon or altogether prohibit expatriation. With this view the laws of all nations have fixed certain essential requisites for the complete denationalization of their subjects or citizens, some going to the extent of requiring the assent or consent of the supreme executive power. How then can these two rights (or claims) be reconciled? If public law recognises in each state the power (faculty) to naturalize the subjects or citizens of another, how can it also admit the power (faculty) in the same state to make conditions or to prohibit expatriation altogether? At first sight it appears that these two rules are irreconcilable; nevertheless the contradiction is only apparent. International law recognises the power (or faculty) in a state to naturalize the subjects or citizens of another, but naturalization does not take place by virtue of said international law, but as a consequence of local legislation. So that the new citizen or subject is the pure and exclusive creation of the civil and political laws of the country of adoption, and he will enjoy solely the rights, privileges and immunities which they confer. And what has been said of naturalization applies to expatriation, or the breaking of the natural bonds of citizenship, which have their origin and are preserved for ever in the shadow of local legislation. The right of expatriation, then, like that of naturalization, is subordinated under the point of view of international law to the general principle that each independent state is sovereign in its own territory, and that its laws are binding upon all persons who are within its jurisdiction, but that they have no force beyond her territory. It clearly follows then, from the doctrine laid down, that while the subject or citizen remains within the limits and under the jurisdiction of his new country, or in any other state, he will preserve the national character conferred by naturalization. But if

he has not acquired the new citizenship, by severing, according to local law, the bonds of the country of his birth, it is evident that the return of the naturalized to his native country will place him again under her jurisdiction, subjecting him to the obligations, duties and penalties which the laws impose, or have imposed, unless there are stipulations to the contrary in special (or particular) treaties. These principles have been recognised in the jurisprudence of the United States."

It is believed that cases in which conflicts have heretofore arisen, as well as others which may arise in future, will be relieved of serious embarrassment and much perplexity, when viewed in the light of the distinction drawn and the reasoning invoked by this author. And if attention is directed to the fact that the conflict between the laws of naturalization and the laws of expatriation is only apparent, much advance will have been made, both in the avoidance of unnecessary controversies and in the settlement of delicate questions of dignity and prerogative between independent states.

"Natural allegiance, or the obligation of perpetual obedience to the government of the country wherein a man may happen to have been born, which he cannot forfeit or cancel, or vary by any change of time, or place, or circumstance, is the creature of civil law, and finds no countenance in the law of nations, as it is in direct conflict with the incontestable rule of that law: *Extra territorium jus dicenti impune non paretur.*" Twiss, Law of Nations (Peace) 231. See also Riquelme, Derecho International, tom. i., p. 319; Pufendorf, de Officio Hominis et Civis, lib. ii., cap. 18.

Since the French Revolution, continental nations generally have given up the Roman civil-law doctrine of perpetual allegiance, and have conceded the right of expatriation. Foreign Relations of the United States, pt. 2, pp. 1363, 1364. Washington : Government Printing Office, 1873.

"It is," says Treitt, "in fact, a principle inherent in human liberty, a principle of natural right, that a person may leave the soil on which his birth may by chance have thrown him. This principle is admitted by all publicists, from Cicero down to our own times." Ibid. 1280, 1282.

"The doctrine of absolute and perpetual allegiance—the root of the denial of any right of emigration," said Cushing (Opinions of Att. Gen. U. S., vol. 8, p. 139), "is inadmissible in the United

States. It was a matter involved in, and settled for us by the Revolution, which founded the American Union."

"The natural right of every free person," said Judge BLACK (Opinions Att.-Gen. U. S., vol. 9, p. 356), "who owes no debt and is not guilty of any crime, to leave the country of his birth, in good faith and for an honest purpose—the privilege of throwing off his natural allegiance and substituting another allegiance in its place—is incontestable."

"Expatriation," said the same authority, "includes not only emigration out of one's native country, but naturalization in the country adopted as a future residence. When we prove the right of a man to expatriate himself, we establish the lawful authority of the country in which he settles to naturalize him if its government pleases. What, then, is naturalization? There is no dispute about the meaning of it. The derivation of the word alone makes it plain. All lexicographers and all jurists define it one way. In its popular, etymological and legal sense it signifies the act of adopting a foreigner, and clothing him with all the privileges of a native citizen or subject."

One of the obvious conclusions which follow from the train of reasoning pursued by the Spanish publicist, Calvo, *ante*, is that there may be, under view of international law, a distinction, important and material in its effects, between the *personal* rights and the *property* rights of a naturalized citizen, as follows: If, as has been shown, the adopted voluntarily returns to his native country, *animo manendi*, or inherits, purchases or leaves real property in its territorial limits, he subjects himself and property to the obligations, duties and penalties which the laws of the country of his birth impose, or have imposed, and he can expect no relief as against these from the country of adoption; and, as to any right or title to property in the country of birth, during absence from the territory, the adopted is entitled to the same exemption, and to the like protection, at the hands of both the country of origin and the country of adoption, as a native or alien friend would receive under the same circumstances. And a majority of the cases which have been the subject of diplomatic negotiation, or have been before the mixed commissions on claims, and have involved a discussion of citizenship, will be relieved of much embarrassment if the above distinction between property rights and personal rights be kept in view.

In the absence of treaty stipulations, the personal rights of the naturalized, in the territory of the country of origin, as elsewhere, are inviolable; and in respect of these the country of adoption owes him the protection that it extends to natives; and this obligation to protect continues, *until the naturalized has given unquestionable evidence of renunciation of the acquired, and resumption of natural allegiance*; a return to and commorance in his native country for purposes of business or pleasure alone, is not such evidence. In respect to property rights in realty within said territory, they remain subject to the municipal law of the country where situated; and the measure of protection which may be claimed as to these is the same as that accorded to its own citizens, or alien friends, according to circumstances.

It is important, however, to observe that if the country of origin, from whatever motive, fails to give the naturalized the protection of its municipal laws, in all matters of property, the obligation rests upon the country of adoption to secure to its new citizen or subject, from the mother country, full reparation and indemnity. And this indemnity is, in practice, usually secured by intervention of diplomatic negotiation, or through the instrumentality of mixed commissions established for this purpose and clothed with the jurisdiction necessary to do justice and equity as between the parties.

In cases of the return of naturalized citizens to the country of origin, the same rule as to the burden of proof, which applies to a renunciation of natural allegiance and the acquisition of a new citizenship by individuals, may be invoked; and the *onus* of proving renunciation of the acquired nationality, and the resumption of the natural or original allegiance, usually rests upon the party alleging it.

From time to time cases have arisen where the country of origin has denied the claims of the country of adoption in respect to the exercise of protection over the adopted citizen. One of the historic and familiar cases was that of Koszta, a Hungarian, and one of the refugees of 1848-9. This was an extreme but interesting case. Koszta came to the United States, declared his intention to become a naturalized citizen, then went to Smyrna, where he was seized by some persons in the pay of the Austrian consulate; he was by them taken out into the harbor and thrown overboard; he was picked up by an Austrian man of war, and held as prisoner; the United States consul remonstrated with the commander, and on the latter's refusal to surrender Koszta, the

captain of a United States ship of war demanded his release, and threatened, if necessary, to resort to force. The matter was finally compromised, and Koszta was released and shipped to the United States, the Austrians formally reserving the empty right of proceeding against him if he should return to Turkey. Of this case it has been said with positiveness by a late writer, that the United States carried the doctrine of acquired nationality beyond reasonable bounds ; and the reasoning of Mr. Marcy, in support of the claim of his government, has been criticised as “ remarkable for its boldness ;” and it is pointed out that in his reasoning “ the effect of domicile in respect of civil consequences is confounded with its effect as to political consequences, which is altogether inadmissible.”<sup>1</sup>

In the subsequent case of Simon Tousig, an Austrian, who voluntarily returned to Austria after domiciliation in the United States, Mr. Marcy did not assert this doctrine. In the first case the American secretary of state was doubtless led into the confusion indicated by his English critic as a result of following the guidance and applying the principles laid down in this regard by the late annotator of Story’s Conflict of Laws. At a later date Lord WESTBURY insisted that the same distinction had been by the learned editor confounded by failing to draw a distinction between the *social* and *political* status—between the *patria* and the *domicilium*. It is now admitted by the American authorities that the declaration of the intention to become an American citizen has in itself no effect on the nationality of the individual ; he remains an alien till final admission to citizenship.<sup>2</sup> But when once the alien has been admitted to citizenship, the American doctrine in its relation to him has always been consistent and firm, and the United States extends to the naturalized citizen as well against interference by the country of origin, as by any other foreign power, protection as broad and co-extensive as that which it extends to the native citizen under similar circumstances. Of the case of Koszta, Lord Chief Justice COCKBURN says, “ both parties were in the wrong ; the Austrians had no pretence of right for seizing Koszta on Turkish territory. On the other hand, the American authorities had no right to claim Koszta as an American subject [?] (citizen), as he had not actually become naturalized. The party really entitled to

<sup>1</sup> *Nationality*, Lord Chief Justice COCKBURN : London, Ridgway, 1869, p. 122.

<sup>2</sup> See Treaties between United States and Austria, Baden, Bavaria, Hesse, Mexico, North Germany, Sweden and Norway, Wurtemberg and Ecuador.

complain was the Ottoman government, which refused the application of the Austrians for leave to arrest Koszta, and protested against the outrage offered to their authority, but whose protest does not appear to have been heeded."

To the remonstrance of the Austrian government, as to a violation by the officers of the United States of the neutrality of Turkish territory, Mr. Marcy replied: "If the Ottoman Porte had been able to protect, against Austrian intrusion, the integrity of its territory, by preventing the capture of a person covered by the North American flag, the United States would not have had occasion to interpose their authority for the protection of this person." Reviewing this case, and referring particularly to the position assumed by the Austrian cabinet and by Baron de Cussy, who adopted the view of Austria, and to the response of the American secretary, Calvo (*Le Droit International*, Paris, 1870, p. 453), seems to justify the position taken by Mr. Marcy, and to regard his answer to Austria, as well as his explanation to the Sultan, as satisfactory.

Alluding to the case of Carl Schurz (actual Secretary of the Interior), Calvo (*Id. ib.*) says: "Another example, not less interesting, of the power which naturalization by states confers upon their new subjects or citizens, is that of M. Carl Schurz, native of Prussia, condemned to death in 1848, together with Professor Kinkel, by a German tribunal, for having taken part in the revolutionary movements. M. Schurz managed to escape the pursuit of justice, and took refuge in the United States, where he was naturalized, became a member of Congress from the state of Ohio, later general of militia, and finally was appointed minister to Madrid. Before proceeding to occupy this post, M. Schurz returned to Germany, by the help of a disguise, and attempted to bring about the escape of his accomplice, Professor Kinkel; it was then that the cabinet at Washington concluded to appoint him her representative at Berlin, to negotiate with Prussia a treaty on questions relating to the right of naturalization. The Prussian government consented to forget the antecedents of M. Schurz, to recognise his new nationality, and to admit him without difficulty in the character of diplomatic representative of the United States. The selection of a former Prussian subject as minister of the United States at Berlin, had an origin which it is important to recall."

In the case of Zeiter, a native of France, but a naturalized citizen of the United States, which came before the civil tribunal of the first instance in the arrondissement of Wissembourg, Lower Rhine, France, in 1860, the attempt was made to hold Zeiter to the performance of military duty in the French army, on the ground that as a native of France, he was liable to such duty. But when the certificate of naturalization, forwarded by the United States consul at Paris, was registered at Wissembourg, and then produced in court, the judges decided "that Michael Zeiter, by naturalization in a foreign country, had lost his character of Frenchman," and released him. Foreign Relations of the United States, Part II., 1873. Washington : Government Printing Office.

In 1860 a case occurred at Havana of Sabino de Liano, a native of Spain, naturalized in the United States, being arrested as a conscript. In reply to the representations of the United States consul, the captain-general informed him that by a royal decree of the 17th November 1852, "the foreigner obtaining naturalization in Spain, as well as the Spaniard obtaining it within the territory of another power without the knowledge and authorization of his respective government, shall not exempt himself from the obligations which were consequent to his primitive nationality, although the subject of Spain may, in other respects, lose the quality of Spaniard, conformably to what is prescribed in art. 1 of the constitution of the monarchy." But to this pretension the United States would not yield, and the answer to this communication from the representative of Spain was, in substance, a repetition of the doctrine that the United States makes no difference between naturalized and native citizens, and that she does not admit any qualification in respect to them in the matter of protection. A shield of one figure and the same texture covers naturalized and native. Eventually the proceedings taken against Mr. Liano were suspended, and a bond which he had entered into to provide a substitute cancelled by the governor-general.<sup>1</sup>

It is not many years since John Mitchel, a native of Great Britain, the Irish patriot, or agitator, as he has been differently characterized, according as the description was by sympathiser or antagonist, became naturalized in the United States. The history of this case shows that Mitchel, having been convicted in the courts of

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<sup>1</sup> Papers relating to foreign relations of the United States on Naturalization and Expatriation, vol. 2, p. 1303 : Government Printing Office, Washington, 1873.

Great Britain of a political offence, was condemned to penal servitude in Australasia, and that before his time was completed he made his escape and reached the United States, where he was naturalized. After many years residence in the United States subsequent to naturalization, Mitchel offered himself, or was announced as a candidate from an Irish borough to fill a vacancy in the British House of Commons. This occurred at a time of some political agitation, particularly in Ireland and Canada; and however fictitious the character or however exaggerated the proportions of this agitation may have been, many circumstances combined to give this ardent Irishman a following, and he was elected. The contingency which would arise, should Mitchel present himself or his credentials to the House of Commons, made it of moment to the government of Great Britain to multiply the grounds of his ineligibility. And although at that date the nation still held to the doctrine of perpetual allegiance, and an eminent publicist of Doctors' Commons had declared upon authority cited (1 Phillimore, *Commentaries on International Law* 380<sup>1</sup>), that, under International Law, banishment itself did not destroy citizenship, it was deemed important to show the American citizenship of this claimant to a seat in one of the Houses of the Parliament of Great Britain. Search was instituted in the courts of the United States, and the record of Mitchel's naturalization having been discovered, a certified copy of the same was forwarded to London by the Minister of Great Britain, Sir Edward Thornton. Mitchel died, however, before the time arrived for the presentation of himself or his credentials to the House of Commons. Had he survived and his right to a seat been insisted upon, some strange and perplexing, though not necessary, questions might have been brought forward for consideration; but it is probable that a near and ready solution would have been reached; for it would have been competent, under the law and custom of Parliament, for the House of Commons to have adjudged Mitchel disabled and incapable to sit as a member, by reason of his previous conviction. (Blackstone, *Commentaries*, vol. 1, p. 162, and note by Christian.)

"Naturalization is usually called a change of nationality. The naturalized person is supposed, for the purposes of protection and allegiance at least, to be incorporated with the naturalizing country. This proposition is, generally speaking, sound; but it must admit

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<sup>1</sup> The references to Phillimore are to the London edition, 1871.

of one qualification similar to that already mentioned with respect to the domiciled subject, if the naturalized person should have been the original subject of a country which did not allow him to shake off his allegiance (*exuere patriam*)," (1 Phillimore, Internat. Law, p. 380). The qualification to which reference is here made is contained in the expression *jus avocandi*, which is defined to be a right which every state has of recalling its citizens from foreign countries, especially for the purpose of performing military services to their own country:" (Id. p. 377). "Great difficulty, however," says the same author "necessarily arises in the enforcement of this right. No foreign nation is bound to publish, much less enforce, such a decree of revocation." And it is further said that the *jus avocandi*, already spoken of, could not be legally denied to the country of origin by the adopting or naturalizing country, though the enforcement of the right could not be claimed. And it is insisted, on the authority of Sir LIONEL JENKINS, that banishment itself does not destroy the original tie of allegiance: (Id. p. 380). The conflicts which have occurred on this subject of allegiance between the country of origin and the naturalizing country, in cases where the former has declined to admit the exercise of the right of expatriation in subject or citizen, have seldom been pressed to the point of war. An historic exception, however, may be found in the war of 1812, between Great Britain and the United States, which was precipitated by the resistance of the United States government to the claim of Great Britain to a right of visitation and search of American vessels on the high seas. "No foreign state," (says Phillimore, p. 377), "can legally be invaded for the purpose of forcibly taking away subjects commorant there. The high seas, however, are not subject to the jurisdiction of any state; and a question therefore arises whether the state, seeking its recalled subjects, can search for them in the vessels of other nations met with on the high seas. This question, answered in the affirmative by Great Britain, and in the negative by the United States of North America, has led to very serious quarrels between the two nations—quarrels which it may be safely predicted will not arise again. For I cannot think that it would be now contended that the claim of Great Britain was founded upon international law. In my opinion it was not."<sup>1</sup>

<sup>1</sup> The editor of Dana's Wheaton, 8th ed., p. 175, note, pointed out that "the subject of the impressment of seamen had been confused by the questions which

The question as to the effect and value of a certificate of naturalization, came up for consideration before the umpire of the American and Spanish Commission,<sup>1</sup> in the case of Delgado, where the arbitrators had disagreed in relation to Delgado's nationality.<sup>2</sup> The umpire decided: "That the claimant (Delgado) has been naturalized an American citizen according to the laws of the United States; that the judge who ordered him to be admitted a citizen of the United States was, as it has been decided in many cases by the Supreme Court of the United States, the competent authority to decide, if the claimant had sufficiently complied with the law which prescribed a continued residence of five years in the United States before having a right to obtain the naturalization."

In this case the advocate of Spain had contended that it appeared from proofs submitted by the defence, that the claimant, Delgado, was absent from the territory of the United States, and in the territory of Spain once or twice between the beginning of his five years of residence in the United States and the issuance of his certificate of naturalization; and, therefore, it must be held that he had not complied with the requirement of the law of the United States in respect to residence. In a subsequent case (*Fernando Dominguez v. Spain*), the same question was presented to the umpire<sup>3</sup> who had succeeded M. Bartholdi. In sustaining the posi-

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have been discussed in connection with it." \* \* \* "In the discussions that arose out of the case of *The Trent*, neither of the parties to the correspondence, and no writer on the subject, pretended that Mason and Slidell could be removed as citizens, rebels or criminals. A right to take them out, as distinct from the arrest of *The Trent*, as a prize proceeding, was not claimed by the United States government, and their release was placed on that ground." Id.

It is a part of the secret history of *The Trent* affair, current in Washington, that when Benjamin F. Butler presented to William H. Seward, Secretary of State, the opinion of Caleb Cushing, endorsed by the former, to the effect that the United States would be justified in holding Mason and Slidell, the secretary said: "I have no doubt you, gentlemen, are right in your law; but we are going to give up *Mason and Slidell*."

See Lawrence's "Visitation and Search," p. 13 *et seq.* Also, Lawrence's Wheaton, pp. 217, 378, 797, 807, 939.

<sup>1</sup> Bartholdi, Envoy Extraordinary and Minister Plenipotentiary from France to the United States.

<sup>2</sup> The agreement of February 11th 1871, between Spain and the United States, contained a clause to this effect: " \* \* \* Nevertheless, in any case heard by the arbitrators, the Spanish government may traverse the allegation of American citizenship, and thereupon competent and sufficient proof thereof will be required."

<sup>3</sup> Baron Blanc, Envoy Extraordinary and Minister Plenipotentiary from Italy.

tion of the United States, and adhering to the decision of his predecessor, Baron Blanc expressed himself as follows: "Finally, neither the authorities on public law nor the agreements between Spain and the United States furnish any unquestioned and controlling definition of what constitutes in fact a legal residence with presumable *animus manendi*, and when absence intervenes with presumable *animus revertendi*, such as would justify or empower the umpire to overrule by force of treaties or of the laws of nations the construction placed by a court of competent jurisdiction upon a municipal law as to the required residence in the United States for the next continued term of five years preceding the admission to American citizenship. Therefore the construction thus given, however broad it may be deemed, must be followed so long as it is unimpeached or unreversed by an American tribunal of superior jurisdiction. The tribunals of the United States are the sole interpreters of the laws of the country, and it is not the privilege of the umpire to review their declarations as to the requirements of these laws."

When this decision of the umpire was filed, the arbitrator on the part of Spain,<sup>1</sup> entered a formal protest to the above extract from the decision, in the following language: "It would be a breach of the proprieties that govern the relations between the arbitrators in a commission like this one and the umpire, for the undersigned to attempt an *argument* on any point that may be embraced or conveyed in a judgment of the latter; he will, therefore, confine himself to making the following statements: It is the belief of the undersigned, that the convention in virtue whereof this tribunal deliberates, grants to Spain, with all its logical and necessary consequences, the right to review the adjudications of courts of the United States, in the matter of granting certificates of naturalization, and that such certificates, whilst they may be held as valid for every purpose in the United States, are not, from the mere fact of their existence, conclusive upon Spain. It is the belief of the undersigned that the above-mentioned right and privilege *constitutes one of the bases* of the convention of February 1871, *in accordance with which* all claims are to be considered. Every judgment given within the bases established by the convention must be beyond question or criticism. But none of the bases themselves can be set aside by the members of this commission."

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<sup>1</sup> Marquis de Potestad-Fornari.

In the case of *Portuondo v. Spain*, in which the decision of the umpire was rendered subsequent to the filing of the protest of the arbitrator of Spain, the umpire held: "That as to the traversed allegation of American citizenship of the deceased, competent and sufficient proof thereof, as required by the agreement of February 12th 1871, is given by his certificate of naturalization, such certificate not being proved or charged to have been procured by fraud or issued in violation of public law, treaties or natural justice. Such grounds of impeachment, upon which any certificate of naturalization may be declared altogether void, not being found in this case, the umpire called upon to resolve such conflict about the allegiance of the deceased must, following previous adjudications by umpires of this commission, and in the absence of any treaty between Spain and the United States restricting the power of the United States to grant naturalization in accordance with the municipal law as interpreted by the municipal courts, give full force to the naturalization of the deceased even against Spain.

"That the allegation that the deceased had lost or forfeited his right of American citizenship by abandonment or renunciation of such citizenship is not sustained by the evidence. No positive proof has been offered to exclude the intention of the deceased to return to the United States, whose nationality he openly and continually claimed, where he had sent his son, and to which country he had manifestly made preparation to go himself for definite settlement, when he was arrested and shot. No positive proof has been offered of any individual act of the deceased implying the renunciation of his American citizenship acknowledged by the Spanish authorities, which renunciation the said authorities declared should, at some proper time, be ordered as a condition of his free sojourn in Cuba, and no evidence that his continued sojourn there is not to be accounted for by the simple omission of the authorities to enforce such contingent condition."

The scope of this discussion is confined to what may be termed individual naturalization. But it may be here stated that a collective naturalization of all the inhabitants is effected when a country or province becomes incorporated in another country by conquest, cession or free gift: 1 Phillimore, Internat. Law, p. 382, citing 2 Günther, p. 268, note e. The purchase of Louisiana, the annexation of Texas, and the acquisition of California, by the United States, present familiar illustrations of collective naturalization.

## II.

The question of domicile has heretofore entered prominently into all discussions on the subject of citizenship, and the difficulty of defining domicile has embarrassed inquiry in this connection. In the light of recent legislation in respect to naturalization by the nations, the discussion as to what does or does not constitute domicile must be of less frequent occurrence and importance. But it will remain, in the absence of naturalization, the controlling question wherever citizenship is claimed, on the ground of domiciliation alone.

It has been pointed out how much of the confusion has been introduced. But until advised as to what is the distinction between the *social* and *political* status, between the *patria* and the *domicilium*, there is danger that confusion will remain. As these latter terms are derived from Roman law, we must look to that system of jurisprudence, and to the exposition of civilians for their definition and signification. "The title [citizenship, *civitas*] says Ortolan,<sup>1</sup> 'was indelible in the pure law of the Romans, when once acquired; for the sentence of the people could deprive a citizen of life, but never of the rights of citizenship without his consent. The exercise of all civil rights, both as regards the *jus publicum* and the *jus privatum*, depended on this title. If it were not there, there was no *status*.'" \* \* \* "The domicile (*domicilium*) is simply, in a legal sense, the residence of every person—the locality where he is supposed to be, in the eye of the law, for certain applications of the law, whether he is corporeally to be found there or not. It is to Roman legislation that we are indebted for the following description of the condition which constitutes the domicile: '*Ubi quis larem rerumque et fortunarum suarum summam constituit, unde non discessurus, si nihil avocet; unde cum prefectus est peregrinari videtur; quod si rediit, peregrinari jam destitit.*' The domicile gives to persons not the qualification of *civis*, but that of *incola*, in the town where they are established. It is closely connected with the obligation to undertake public duties, magistracies, &c. \* \* \* In Roman law the question of domicile was immediately connected with that of local citizenship. \* \* \* There are, therefore, these three points to be distinguished: first, Rome, the common country [*patria*]; second, the local city, where a man

<sup>1</sup> Generalization of Roman Law. Translation of Pritchard and Nasmith: Butterworths, London, 1871, p. 573 *et seq.*

was *civis, municeps*; and third, the place where he had fixed his domicile, the legal habitation, where he was *incola*.

It is not admitted "that the domicile is *the place* where a person has his principal establishment; the domicile is not *the place*, it is *at the place*, as our civil code plainly says."<sup>1</sup> Further on it is added: "The domicile, in its simple and essential meaning, is, 'the *legal seat, the judicial seat* of a person for the exercise or for the application of certain rights.' The derivation of the word '*domicilium*' is sufficient to show the force of this explanation, as exact as it is simple."

"But why," says the publicist cited, "should the question be asked, whether a man belonged, as citizen, to one town or another? It was, in the first place, on account of the public offices, and the municipal duties to which a man was always liable to be called in his own city, independently of those duties required of him at the place of his domicile—municipal duties which recall to mind the miserable condition into which the *curiales* and the *decurions*, the principal inhabitants of the city, had fallen during the last period of the empire. It was, in the second place, because the constitution of Caracalla, granting equality of rights to all the inhabitants, did not grant it to all territories. We have seen that it was only under Justinian that the difference as to the soil was obliterated. In fact it was necessary to ascertain the domicile in order to determine who was liable to the burdens and obligations of each separate municipality to undertake the functions of magistrate; and, in many cases, it was the domicile and not the residence of the defendant which determined the place of litigation."

"Generally," it is said,<sup>2</sup> "the question of domicile is difficult to determine, and it is sometimes connected with or surrounded by circumstances that are transcendent and incalculable. The only fixed rule, or better said, the only controlling rule which can be adduced is the intention of the party." This author gives Phillimore's definition as follows: "Domicile corresponds nearly to the signification of our word '*home*', and when a person has two residences the phrase where '*he has made his home*' indicates which is his domicile." But he says, "it is considered that the North American Judge RUSH best defined domicile when he said that it

<sup>1</sup> Ortolan, Generalization of Roman Law 596, note.

<sup>2</sup> Calvo, Derecho Internacional, vol. 11, p. 94-96.

was ‘a residence at a particular place, accompanied with positive or presumptive proof of continuing it an unlimited time:’” *Guier v. O'Daniel*, 1 Binn. 349. “It is important,” says another author,<sup>1</sup> “to distinguish between domicile and residence—there might be domicile without residence, or residence without domicile. Residence is preserved by the act, domicile by the intention.” A Spanish publicist, in referring to domicile, describes it as “a certain kind or character of establishment, or a certain number of years of continuous residence, from which is inferred the intention to remain for ever.” He adds, in the same connection, “The consent of the individual is necessary, in order that the privilege—*el domicilio a la extraccion*—may impose the obligations appropriate to, or which attach to citizenship.”<sup>2</sup>

In this connection Lord Chief Justice COCKBURN says:<sup>3</sup> “*Domicile*, which in legal phraseology is neither more nor less than a name for home, and the establishing of which may be said to be settling in a given locality with a present intention of permanently abiding there, has been suggested by some writers as sufficient to constitute a person a citizen of the country in which it is established, and we have seen that in some countries the being domiciled for a certain period gives the right of citizenship. But this position is altogether inadmissible. Jurists have for convenience in determining a man’s personal status or capacity, or in administering his effects, or in matters of testamentary disposition, looked to domicile as determining by what law a man’s rights and liabilities should be ascertained. But it is a very different thing to make domicile determine the question of nationality. Indeed, it may be doubted whether jurists have not gone too far in giving weight to the fact of domicile, even in matters of personal property. In a recent case in the House of Lords (*Morehouse v. Lord*, 10 H. of L. Cas. 272), Lord CRANWORTH and Lord KINGSDOWN held that, even for testamentary purposes, in order to lose a domicile of origin, and acquire a new one, a man must intend to change his nationality as well as his abode, or to use a phrase adopted by Lord CRANWORTH, ‘*quatenus in illo exuere patriam!*’”

The learned author gives as a further reason for not permitting

<sup>1</sup> Ortolan, Generalization of Roman Law. Translation of Pritchard and Nasmith : London, 1871, p. 599.

<sup>2</sup> Pando, Elementos del derecho Internacional: Madrid, 1852, p. 152.

<sup>3</sup> Nationality, Ridgway : London, 1869.

domicile of itself to confer nationality, that "it has the effect of excluding the exercise of that judgment which ought always to be exercised by the proper state or authority as to whether a person applying to be naturalized is, with reference to character and other circumstances one, who ought to be admitted to the status of a subject."

It is submitted, that frequently the conflict as to what is in fact the citizenship of a particular individual, arises from a confusion of ideas in respect of the true signification of the terms "domicile" and "residence," and in giving to the one or the other a too restricted, or a too limited application.

While an individual can have but *one* domicile, he may have many residences:<sup>1</sup> the residence may be constructive; and a familiar instance in the United States, is afforded in the cases of citizens of the several states holding public office at the national capital, who though actually resident there, are, constructively, resident or in fact domiciled in their respective states; their domicile is in a particular state, to which they return or may return to exercise the elective franchise.

Cases have arisen where citizenship by naturalization has been denied by the country of origin, as against the latter, and it has been urged that such citizenship is qualified, and that it cannot avail against the country of origin. But this position has rarely been insisted upon to the point of actual conflict, and we have shown from the authorities that, in practice, except in the case of the voluntary return of the naturalized to the country of birth, *animo manendi*, it is waived by the nations. The serious inconvenience, resulting from the maintenance of any such doctrine at this day, must be apparent; "*a qualified citizen*," is a strange anomaly, and involves a misapplication and abuse of language; such an one would be a political Frankenstein, clothed in the form and with the features of a member of the society into which he is introduced, but without the essential faculties and attributes which constitute an active, intelligent organism. An individual cannot

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<sup>1</sup> Ch. J. COCKBURN, ("Nationality,") says, "it is quite possible for a person to have two domiciles." Support for this position is found in the works of some of the civilians; but the later English and American authorities hold that there is in fact but *one* domicile at a time; the other habitations may be residences.

be at one and the same time a citizen of two states.<sup>1</sup> And as a general proposition an individual can have only one allegiance: (1 Phillim. 378.) As protection and allegiance are correlative terms, and involve reciprocity, it may sometimes aid in determining to whom allegiance is due, if it can be ascertained under whose protection an individual actually lives and exercises prerogative rights. He must be held to be a citizen of that nation, upon whom rests, until forfeiture by some act of the individual, the obligation to protect these prerogative rights—whether they be rights of property or rights of person. On the question of the singleness of *citizenship*, it is believed that the weight of authority in America sustains the doctrine laid down by Zouche, and that it is in harmony with that of Rome after the constitution of Caracalla, which found expression in the declaration of the Latin citizen, “*Roma communis nostra patria est.*<sup>2</sup>

“The supposition that a man can have two domiciles,” says Ch. Justice SHAW: (*Abingdon v. North Bridgewater*, 23 Pick. 170, 177), “would lead to the absurdest consequences. If he had two domiciles within the limits of distant sovereign states, in case of war, what would be an act of imperative duty to one, would make him a traitor to the other.” It is laid down: (*White v. Brown*, 1 Wall. Jr. 217), “that all the controversy upon the point of change of national domicile, must ultimately come to Lord KINGSDOWN’S rule: the party must intend to put off one nationality and put on another.”

In the case of *Barclay v. United States*,<sup>3</sup> the claimant, a British subject, had resided many years in the United States. The counsel for the United States, *R. S. Hale*, assisted by *E. Rockwood Hoar*, insisted that being *domiciled* in the United States, he was not within the provisions of the treaty a British subject. But Her Britannic Majesty’s counsel, *J. Mandeville Carlisle*, would not concede that the *residence* of claimant in the state of Georgia could be called a *domicile*. Other grounds were suggested in argument for and against; but the decision, on demurrer, of two com-

<sup>1</sup> Zouche, *De Jure Faciali* (cited by Phillimore, *Commentaries on International Law*), 2, s. ii., xiii. Hefter maintains the contrary doctrine, § 59.

<sup>2</sup> Ortolan, *Generalization of Roman Law* 598; Phillimore, *Commentaries on International Law* 378; Austin, *Jurisprudence*, Student’s ed. 163–4.

<sup>3</sup> Mixed Commission on British and American claims, under treaty of Washington, May 8th 1871.

missioners was in favor of the British nationality of claimant. On the facts in this case there would seem to be no room to doubt the correctness of this decision; and the language and expressions in which the decision was announced, indicate that the commissioners had not failed to draw the distinction between domicile and residence, or the commorance of an alien for purposes of trade or pleasure in the territory of a foreign country.

In a case before the commission, which was organized under the convention of July 4th 1868, between the United States and Mexico, Anderson and Thompson presented a petition claiming indemnification for damage suffered by them in their real estate in Mexico. It appeared that they had purchased land in Mexico under the Mexican colonization laws, settled upon it, and brought it to a high state of cultivation. It was greatly damaged by the Mexican army in the operations in resisting the French invasion, and the plantation was subsequently declared by Mexico to be public land. Objection, founded on their domicile, was taken by the counsel for Mexico, who insisted that in consequence of such domicile they could not claim against Mexico as American citizens. On the part of the United States it was maintained that they were American citizens, and entitled to claim as such under the treaty. The commissioners differing, referred the question to the umpire, *Dr. Francis Lieber*. In his decision the umpire said: "Anderson and Thompson became citizens, it is asserted, of Mexico, by acquiring land, for there is a law of the Mexican republic converting every purchaser of land into a citizen, unless he declares, at the time, to the contrary. This law clearly means to confer a benefit upon the foreigner purchaser of land, and equity would assuredly forbid us to force this benefit upon claimants (as a penalty, as it were, in this case) merely on account of omitting the declaration of a negative; that is to say, they omitted stating that they preferred remaining American citizens, as they were by birth, one of the very strongest of all ties." The question presented to the umpire being, whether Anderson and Thompson were *bona fide* citizens of Mexico, and not citizens of the United States, when they suffered the injuries complained of, he decided that they were citizens of the United States.

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(*To be continued.*)